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No. 88-1894

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1989

JAY LOUIS GIBSON AND ALLEN N. BRUNWASSER,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
*Acting Solicitor General*
EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*
LOUIS M. FISCHER
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

8 pp

## QUESTION PRESENTED

Whether the trial court's removal of petitioner Gibson's out-of-state attorney prior to trial is subject to interlocutory appellate review via either mandamus or habeas corpus, when petitioner Gibson has not yet been tried.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals denying petitioners' mandamus petition (Pet. App. 18A) and the order of the court of appeals affirming the dismissal of petitioner Gibson's habeas corpus petition (Pet. App. 36A-37A) are not yet reported.

### JURISDICTION

The judgment of the court of appeals in both cases was entered on January 17, 1989. Petitions for rehearing were denied on March 15, 1989 (Pet. App. 39A). The petition

for a writ of certiorari was filed on May 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

On July 16, 1987, petitioner Gibson was indicted by a grand jury sitting in the District of Columbia. The indictment charged him with one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gibson retained an out-of-state lawyer—petitioner Brunwasser—and local counsel to represent him. On November 24, 1987, prior to trial, the district court withdrew its permission for Brunwasser to appear pro hac vice and precluded Brunwasser from representing petitioner. Thereafter, petitioner and Brunwasser filed a petition for a writ of mandamus in the court of appeals. The petition challeged the district court's removal of Brunwasser. At the same time, petitioner Gibson filed a habeas corpus action in the district court raising the same issue. The district court denied that petition, and Gibson appealed.

The court of appeals denied the mandamus petition on the ground that mandamus was not an appropriate remedy. The court held that petitioners did not have a clear right to relief, that the district court had no nondiscretionary duty to honor that right, and that an otherwise adequate remedy was available. Pet. App. 18A. The court of appeals also affirmed the dismissal of Gibson's habeas corpus action. Relying on this Court's decision in *Flanagan* v. *United States,* 465 U.S. 259 (1984), the court held that "[o]rders disqualifying defendant's counsel in a criminal proceeding cannot be the subject of an interlocutory appeal. * * * Accordingly, this court will

review the errors claimed in this criminal case on appeal after conviction." Pet. App. 36A.*

**ARGUMENT**

Petitioners contend (Pet. 15-22) that the court of appeals should have allowed them to challenge prior to trial—either by way of mandamus or habeas corpus—the removal of Brunwasser as Gibson's lawyer. Contrary to that claim, the court of appeals correctly held that post-conviction review would be adequate to challenge the propriety of the district court's ruling concerning Brunwasser.

In *Flanagan* v. *United States,* 465 U.S. at 266-270, the Court held that the disqualification of a defendant's lawyer is not subject to interlocutory review. As the court of appeals recognized (Pet. App. 36A), *Flanagan* bars pretrial review of Gibson's claim that the district court erroneously removed Brunwasser. *Flanagan* requires that Gibson await the direct appeal from his conviction before he can challenge the removal of Brunwasser as his lawyer. Of course, should Gibson be acquitted at trial, the entire issue will become moot.

Contrary to petitioners' claim (Pet. 20), the fact that Brunswasser also appealed his disqualification is of no moment. In *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 440-441 (1985), the Court extended *Flanagan*'s holding to civil cases. The Court also observed that a disqualified attorney's "desire for vindication" does not provide a basis for interlocutory review. *Id.* at 434-435. Indeed, it has been held that a disqualified attorney never has the right to judicial review of the disqualification order. *Law Offices of Seymour M. Chase, P.C.* v. *FCC*,

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* Petitioner Gibson has not yet been tried. We have been informed by the United States Attorney's Office that Gibson's trial has been stayed pending the resolution of this petition.

843 F.2d 517, 521 (D.C. Cir. 1988); *id.* at 522-523 (Williams, J., concurring). Consequently, Brunwasser's participation in the case does not affect the correctness of the court of the appeals' holding.

Nor can petitioner Gibson escape the rule in *Flanagan* by styling his action as a petition for habeas corpus. This Court observed in *Sunal* v. *Large*, 332 U.S. 174, 179 (1947), that habeas corpus relief is not available when there is an appellate remedy for the claimed error. Moreover, "[t]he rule is even more strict" when habeas corpus is sought prior to trial. *Id.* at 179 n.11. Since Gibson has an adequate remedy on direct appellate review of any conviction that might result after he is tried, he is not entitled to habeas corpus relief.

Petitioners are incorrect in their contention that *Fuller* v. *Diesslin*, 868 F.2d 604 (3d Cir. 1989), conflicts with the decision below. In that case the defendant had already been convicted and had exhausted his state appellate remedies before challenging on habeas corpus the pretrial disqualification of his attorney. *Id.* at 605. *Fuller* is therefore in accord with the final judgment rule of *Flanagan* and the rulings of the courts below.

## CONCLUSION

The petition of a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**
EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*
LOUIS M. FISCHER
*Attorney*

AUGUST 1989

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* The Solicitor General is disqualified in this case.

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